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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1096~~ 129

COMPTROLLER OF THE TREASURY OF THE STATE OF MARYLAND,

Petitioner,

v.

THE GLENN L. MARTIN COMPANY
(NOW KNOWN AS THE MARTIN COMPANY),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND APPENDICES

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INDEX

Table of Contents

	PAGE
Petition for a Writ of Certiorari to the Court of Appeals of Maryland	1
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ:	
1. This case should be decided finally by this Court and by no other, since the United States Government is the real party in interest	8
2. It is vital that this case be decided finally by this Court and by no other because of the far reaching effect of the decision of the Court of Appeals of Maryland in this case in other jurisdictions if allowed to stand	8
3. This case should be finally decided by this Court and by no other, since the decision of the Court of Appeals of Maryland is one in which the highest court of the State has ruled against the Treasury of its own State and in favor of the United States Treasury and based its decision, in essence, solely upon the repugnancy of a State statute to the Fourteenth Amendment to the United States Constitution	9
4. It is vital that this case be finally decided by this Court and by no other since the decision squarely presents the question of how far can a tax be retroactively imposed	12

PAGE

5. It is vital that this case should be decided by this Court and by no other, since this decision, if allowed to stand, is a blow not only to other States but also to the declared policy of the Federal Government itself which, for a number of years, has been encouraging the States to re-assume a greater share of responsibility for local government 14

6. It is vital that this court consider that part of the holding dealing with the pre-1957 law since that part appears to be in conflict with recent decisions of this Court 16

CONCLUSION 17

TABLE OF CITATIONS

Cases

Alabama v. King & Boozer, 314 U.S. 1, 86 L. Ed. 3, 62 S. C. 43 ..... 14, 16

Arkansas v. Texas, 346 U.S. 368, 98 L. Ed. 80 12

Baltimore Foundry v. Comptroller, 211 Md. 316, 127 A. 2d 368 ..... 5, 6

City of Detroit v. Murray Corp., U.S. , 2 L. Ed. 2d 441, 78 S.C. 14, 15, 16, 17

Comptroller v. Aerial Products, 210 Md. 627, 124 A. 2d 805 ..... 5, 6, 7, 13, 14, 15

Comptroller v. American Can Co., 208 Md. 203, 117 A. 2d 559 15

Curry v. United States, 314 U.S. 14, 86 L. Ed. 9, 62 S. C. 48 ..... 14, 16

Frostburg v. Jenkins, 215 Md. 9, 136 A. 2d 852 11

Home Utilities Co. v. Revere, 209 Md. 610, 122 A. 2d 109 ..... 10, 11

PAGE

James v. Bravo Contracting Co., 302 U.S. 134, 82 L. Ed. 155, 58 S. C. 208 ..... 14, 16

McCullough v. Maryland, 4 Wheat. 316, 4 L. Ed. 379 14

Minnesota v. National Tea Co., 309 U.S. 551, 84 L. Ed. 920 12

Oursler v. Tawes, 178 Md. 471, 13 A. 2d 763 10

Sanitary Comm'n v. Noel, 155 Md. 427, 142 A. 634, cert. den. 278 U.S. 573, 73 L. Ed. 513 15

United States v. City of Detroit, ... U.S. ....., 2 L. Ed. 2d 424, 78 S.C. 14, 15, 16

United States v. Township of Muskegon, ... U.S. ....., 2 L. Ed. 2d 436, 78 S.C. 14, 15, 16, 17

Welch v. Henry, 305 U.S. 134, 83 L. Ed. 87 12

West Virginia v. Sims, 341 U.S. 22, 95 L. Ed. 713 11

Wilgard Realty Co. v. Comm'r of Internal Revenue, 127 Fed. 2d 514 (2d Cir., 1942) cert. den. 317 U.S. 655, 87 L. Ed. 527 12

Statutes

Fourteenth Amendment, Constitution of the United States 2, 7, 9, 10, 11

28 U.S.C.A. 1257 (3) 2

Constitution of Maryland, Declaration of Rights 9

Declaration of Rights, Article 2 11

Declaration of Rights, Article 8 ..... 7, 15

Declaration of Rights, Article 23 ..... 7, 9, 10, 11

Annotated Code of Maryland, Article 81, Section 324(f)(6) (1957 Ed., Vol. 7, p. 493) 2

Annotated Code of Maryland, Article 81, Section 372(d) (1957 Ed., Vol. 7, p. 514). 2

Chapter 3, Acts of the General Assembly of Maryland of 1957 ..... 2, 6, 7, 11, 13, 15, 16

TABLE OF CITATIONS

Miscellaneous

	PAGE
Genesis 27:22	8
Niles: Maryland Constitutional Law (1915 Ed.)	9, 10
35 Opinions of the Attorney General of Maryland 285	4, 5, 6, 13, 14, 15

INDEX OF APPENDICES

Appendix A

	APP. PAGE
Statutory Provisions Involved	19
Maryland Retail Sales Tax Act	19
Maryland Use Tax	20
Chapter 3 of the Acts of 1957, Maryland General Assembly	22

Appendix B

Opinion of Court of Appeals of Maryland	26

Appendix C

Opinion of Attorney General of Maryland, 35 Opinions 285	47

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No. ------

COMPTROLLER OF THE TREASURY OF THE STATE OF MARYLAND,

Petitioner,

v.

THE GLENN L. MARTIN COMPANY
(NOW KNOWN AS THE MARTIN COMPANY),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above entitled case on March 31, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported in 216 Md. 235, and in 140 A. 2d 288. It is printed in Appendix B hereto, *infra*, page 26.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on March 31, 1958. There was no motion for re-argument. The jurisdiction of this Court is invoked under

28 U.S.C.A. 1257(3) since the validity of a State statute on grounds of repugnancy to the Fourteenth Amendment of the United States Constitution is drawn in question.

QUESTIONS PRESENTED

1. Whether the retroactive application of a 1957 amendment to the Maryland Sales and Use Tax Acts violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the lower court's holding that Martin's transactions were not subject to the Maryland Sales and Use Tax Acts prior to the 1957 Amendment is in direct conflict with decisions of this Court involving similar transactions.

STATUTES INVOLVED

The statutory provisions directly involved were enacted as Chapter 3 of the Acts of the General Assembly of Maryland of 1957, and are now codified as Article 81, Sections 324(f)(6) and 372(d) of the Annotated Code of Maryland (1957 Ed., Vol. 7, pp. 493, 514). They are printed in Appendix A, *infra* page 22, together with certain other related sections of the Maryland Sales and Use Tax Acts.

STATEMENT

The Glenn L. Martin Company (now known as The Martin Company, and hereinafter referred to as "Martin") operates a large plant at Middle River, Baltimore County, Maryland, for the manufacture of aircraft, guided missiles, special weapons and related equipment. Almost all of its sales are military in nature and are made to the agencies of the United States Government (R. 29).

Upon the outbreak of the Korean War in 1950, it became necessary for Martin to rehabilitate and recondition its

plant and to acquire new and greatly expanded production facilities in order to manufacture the products needed by the Government. Since Martin could not afford to finance this capital expansion by itself, it negotiated three so-called facilities contracts with agencies of the United States Government (R. 14). Two of these contracts were made with the Navy and the third was made with the Air Force. All three contracts are substantially identical. The pertinent provisions of each are set forth in the certified record extract from the Court of Appeals of Maryland, commencing respectively at pages 48, 65 and 86.

The contracts provided that certain facilities were to be furnished by the Government from its industrial reserves where available, but that the remaining facilities were to be purchased by Martin from regular vendors (R. 50, 66, 88). The contracts were cost-reimbursement contracts, and any sales and use taxes paid by Martin to the State of Maryland were to be reimbursed to Martin by the United States Government (R. 62, 81, 92). The contracts provided that title to the facilities should pass to the Government upon delivery to Martin (R. 55, 72, 89). Martin was given the right to use the facilities for work on government contracts free of charge (R. 52, 70, 89). The contracts also contained provisions, *inter alia*, relating to government approval of purchases (R. 51, 67, 87) in order to insure that the facilities were not available elsewhere (R. 17); the government's right to terminate Martin's use of the facilities upon due notice (R. 54, 70, 98); the government's right to abandon the facilities (R. 54, 71); Martin's tagging of the facilities so as to show government ownership (R. 17); maintenance of the facilities by Martin in accordance with government standards (R. 51, 68, 97); provisional payments by the government during the purchase program (R. 60, 79, 91); the government's lien upon the

facilities to the extent of advance payments made prior to final acceptance by the Government (R. 61, 80, 83); and inspection and final acceptance or rejection of the facilities before completion of payment by the government (R. 59, 77, 91). Martin was not permitted to make any profit on its purchases of facilities under the contracts (R. 34). Martin used the facilities in the regular course of its business (R. 35).

In 1950, the then Attorney General of Maryland, Hall Hammond, now a Judge of the Court of Appeals of Maryland, had ruled that the Comptroller of the Treasury of Maryland should collect sales and use taxes on transactions similar to the Martin purchases where title to facilities purchased by a contractor in its own name passed to the government upon delivery to the contractor. The Attorney General ruled that the passing of title to the facilities to the government did not make the transaction a "resale" which would exempt the facilities from sales taxes. 35 Opinions of the Attorney General 285, printed in Appendix C, *infra*, page 47.

Applying this ruling to the Martin contracts the Comptroller of the Treasury, commencing in 1951, assessed sales and use taxes on the purchases of the facilities by Martin. The taxes were paid under protest by Martin, and claims for refund were duly filed by Martin (R. 4). Hearings on these claims were held by the Comptroller December 9, 1954 (R. 9-31) and on January 13, 1955 (R. 31-44). After the hearings, the Comptroller denied the refunds (R. 126-130). Martin duly appealed to the Circuit Court for Baltimore County (R. 131-135).

In accordance with a stipulation made by Martin and the Comptroller, the amount of any refund due Martin would be $311,539.28 (R. 44-48). Additional claims for

refund were subsequently filed by Martin. These claims also would be governed by the decision in this case. The Comptroller's office has estimated that, if a refund is due Martin, the State of Maryland will ultimately have to refund approximately one and a half million dollars to Martin and to other manufacturers who have contracts similar to Martin's.

Before Martin's appeal from the Comptroller's decision was heard by the Circuit Court for Baltimore County, the Court of Appeals of Maryland, in July 1956, handed down a decision involving similar facilities contracts. *Comptroller v. Aerial Products,* 210 Md. 627, 124 A. 2d 805. One aspect of the decision concerned the purchasing contractor as agent of the United States Government. That aspect is in no way involved in the Martin case. The other aspect involved an interpretation of the Sales and Use Tax Act relating to the purpose of the purchasing contractor. That aspect was similar to the question upon which Judge Hammond had ruled when Attorney General in 1950, and also to the matters concerned in the Martin claims for refund. The Court of Appeals of Maryland, in the *Aerial Products* case, *supra,* held that since Aerial Products, the contractor had not used the facilities purchased before title passed to the government these purchases were not subject to the Sales Tax Act. *Supra,* 210 Md. 627, 644, 124 A. 2d 805, 814.

Another case on a similar question involving private, as opposed to governmental, purchasers was decided by the Court of Appeals of Maryland in December 1956 before Martin's appeal in the Circuit Court for Baltimore County was heard. *Baltimore Foundry v. Comptroller,* 211 Md. 316, 127 A. 2d 368. The Court of Appeals, in that case, held that sales of patterns by a foundry were not subject

to sales tax since there were real and profitable resales, although it was not possible from the record to determine when title to the patterns passed to the purchaser for whom the products were cast prior to the beginning of production. The Court of Appeals of Maryland held, in effect, that time of passage of title was "not controlling" so long as the resales were "profitable and real". *Supra*, 211 Md. 316, 322, 127 A. 2d 368, 370-371.

These two cases appeared to be a departure from what had been the long standing practice of the Comptroller in taxing purchases under facilities contracts. *This practice of taxing had been carried out for nearly seven years from 1950 through 1956, in accordance with the ruling of Judge Hammond when Attorney General.* These cases cast doubt on the taxability of the Martin purchases under its contracts. Accordingly, the General Assembly of Maryland, at its next session, in order to clarify the situation and to avoid a possible substantial loss of revenue to the State of Maryland, particularly if the *Aerial Products* case were held to control the Martin purchases, passed an act amending the Sales and Use Tax Acts so that there could be no question that these taxes would be due on purchases under facilities contracts such as Martin's. The Legislature made these provisions retroactive to July 1, 1947, the date of the original enactment of the Sales and Use Tax Acts. As to Martin they had a retroactive effect of six years, that is back to purchases made by Martin in 1951.

After this enactment, Chapter 3 of the 1957 Acts (printed in Appendix B, *infra*, p. 22), Martin was permitted to amend its appeal from the Comptroller's decision in the Circuit Court for Baltimore County so as to include the additional questions presented by Chapter 3. The federal question sought to be reviewed by this Court, the repugnancy of the retroactive effect of Chapter 3 to the

Fourtenth Amendment to the United States Constitution, was first raised by Martin in its petition to amend its complaint (R. 138-139).

The Circuit Court for Baltimore County subsequently heard Martin's appeal March 22, 1957 (R. 147-149). It reversed the decision of the Comptroller. It found that the *Aerial Products* decision, *supra*, controlled the Martin case under the law before the 1957 enactment. It also found that the retroactive effect of Chapter 3 was unreasonable and therefore, although not directly so stated, in violation of the Equal Protection Clause and the Due Process Clause of the United States Constitution, as well as in violation of Article 23 of the Maryland Declaration of Rights. It further found that the 1957 Act abrogated Article 8 of the Maryland Declaration of Rights, relating to separation of powers, and held that the Legislature by this enactment had usurped the function of the Court of Appeals and had attempted by legislation to reverse that court's decision in the *Aerial Products* case, *supra*. The Circuit Court for Baltimore County accordingly entered judgment for Martin in the stipulated amount of $311,539.28 (R. 150-162).

From that decision, the Comptroller appealed to the Court of Appeals of Maryland. That Court, which is the highest court of Maryland and which had proper jurisdiction of the matter on appeal from the lower court, on March 31, 1958 affirmed the decision of the lower court. It filed its opinion the same day, holding (1) that under its decision in *Aerial Products v. Comptroller*, 210 Md. 627, 124 A. 2d 805, Martin would not be taxable under the Sales and Use Tax Acts as in force prior to January 1957; and (2) that the retroactive application of Chapter 3 of the Acts of 1957, which in Martin's case would amount to six years, was in conflict with Article 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth

Amendment to the Constitution of the United States. From that judgment, the Comptroller files this petition for a writ of certiorari to review the decision of the Court of Appeals of Maryland.

REASONS FOR GRANTING THE WRIT

1. *This case should be decided finally by this Court and by no other, since the United States Government is the real party in interest.*

The refunds directly involved in this case, $311,539.28, will nominally be paid to Martin. They will then be reimbursed by Martin to the United States Government as a part of the cost of the facilities purchased under the contracts. Martin is consequently only a conduit through which these taxes will be refunded to the Federal Government. Despite its obvious interest, the Federal Government has apparently preferred anonymity in this case. It did attempt at one point to intervene in the case. It was denied this right by the Court of Appeals of Maryland, since its attempt was not timely made. It later partially abandoned its cloak of anonymity when it filed a brief as *amicus curiae*. Otherwise, it has remained disguised in this case under the garb of the Martin Company. This seeking of reward under the guise of another is not entirely novel:

> "The voice is Jacob's voice, but the hands are the hands of Esau." Genesis 27:22.

2. *It is vital that this case be decided finally by this Court and by no other because of the far reaching effect of the decision of the Court of Appeals of Maryland in this case in other jurisdictions if allowed to stand.*

This case is of great importance not only to the State of Maryland but also to all other States which impose sales and use taxes and in which private contractors and manu-

facturers operate under facilities contracts with the United States Government, or otherwise use government property for their own profit in their regular course of business. It is relatively unimportant, though nonetheless painful, that the Petitioner, the Comptroller of the Treasury of Maryland, may eventually have to refund approximately one and a half million dollars collected in sales and use taxes if the decision of the Court of Appeals of Maryland is allowed to stand.

3. *This case should be finally decided by this Court and by no other, since the decision of the Court of Appeals of Maryland is one in which the highest court of the State has ruled against the Treasury of its own State and in favor of the United States Treasury and based its decision, in essence, solely upon the repugnancy of a State statute to the Fourteenth Amendment to the United States Constitution.*

It is immaterial that the decision was also based on Article 23 of the Maryland Declaration of Rights, which reads as follows:

> "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Annotated Code of Maryland (1957 Ed.) Vol. 9, p. 44.

The leading text on the Maryland Constitution divides the forty-five articles of the Declaration of Rights into four classes. Class B is defined as follows:

> "In this class are to be found articles two, three, seventeen, eighteen, nineteen, *twenty-three*, twenty-four and forty-two.
>
> The verbiage in some of these articles is slightly different from the wording of the similar provisions in the Federal Constitution, but in fact the matters cov-

ered by them are substantially covered by the Federal Constitution, and *for all practical purposes the provisions in the Maryland Declaration of Rights add nothing to what the law would be without them.*" *Niles, Maryland Constitutional Law*, page 13. (Emphasis supplied.)

The same text writer notes that Article 23, prior to the adoption of the Fourteenth Amendment to the United States Constitution in 1868, would have been placed in Class "C" "Limitations on the power of the States similar to those limitations prescribed in the United States Constitution for the Federal Government." Thus, additional protection would have been afforded a citizen of Maryland under Article 23 from 1776 through 1868, when the Fourteenth Amendment was adopted. However, as Niles states in his discussion of Article 23:

> "The rights secured by this article are now covered by the 14th Amendment to the United States Constitution, and consequently it may be properly termed *a mere duplication of provisions found in that instrument* and we have, therefore, placed it in Class B." *Niles, supra*, page 46. (Emphasis supplied.)

Niles' analysis of Article 23 has been consistently followed by the Court of Appeals of Maryland:

> "... article 23 of the Maryland Declaration of Rights is in harmony with the 5th and 14th Amendments to the Federal Constitution, and *the term 'due process of law,' as used in said amendments, has been construed to be synonymous with the expression 'law of the land' as used in said article. Niles, Constitutional Law*, p. 46." *Oursler v. Tawes*, 178 Md. 471 at 483, 13 A. 2d 763 at 768. (Emphasis supplied.)

The Court of Appeals has also recently stated:

> "In construing this article (23) of the Declaration of Rights, the decisions of the Supreme Court on the

> Fourteenth Amendment are 'practically direct authorities'." *Home Utilities Co. v. Revere*, 209 Md. 610 at 614, 122 A. 2d 109 at 110-111 (1956).

Citing the *Home Utilities* case, *supra*, the Court of Appeals has reaffirmed its decision on this point as recently as December, 1957. *Frostburg v. Jenkins*, 215 Md. 9 at 15, 136 A. 2d 852 at 845-855.

That part of the Martin holding resting on Article 23, is merely surplusage, a redundancy. *The only real operative ground of the holding is the Fourteenth Amendment which, as an amendment to the United States Constitution, is part of the supreme law of the land and takes precedence over the Maryland Constitution and the Maryland Declaration of Rights.*

> "*The Constitution of the United States*, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, *are, and shall be the Supreme Law of the State; and the Judges of this State and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.*" Article 2, Maryland Declaration of Rights, Annotated Code of Maryland (1957 Ed.), Vol. 9, p. 20. (Emphasis supplied.)

In the words of the Court of Appeals of Maryland, the decision of this Court would be practically a direct authority on Article 23. Furthermore, there is no reason why this Court cannot expressly construe Article 23 of the Maryland Declaration of Rights to determine whether Chapter 3 of the 1957 Acts violates its guarantees. This Court has construed a State Constitution in the past and has declared that it was not violated by certain provisions of a compact where the State court had found to the contrary. *West Virginia v. Sims*, 341 U.S. 22, 33, 95 L. Ed. 713, 724. This is not a case where the State court has the final

say, cf. *Arkansas v. Texas*, 346 U.S. 368 at 372, 98 L. Ed. 80 at 84, but one involving essentially a question of federal constitutional interpretation, *which should be decided by this Court and no other in order that "state courts will not be the final arbiters of important issues under the Federal Constitution". Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 84 L. Ed. 920, 924. (Emphasis supplied.)

4. *It is vital that this case be finally decided by this Court and by no other since the decision squarely presents the question of how far can a tax be retroactively imposed.*

As noted by the lower court in its opinion in discussing the case of *Welch v. Henry*, 305 U.S. 134, 83 L. Ed. 87, where this Court definitely held that a two year retroactive effect was valid:

> *"How far this limit extends was not defined by the Supreme Court in that case, or in any subsequent case to date." Infra*, page 40. (Emphasis supplied.)

The Court of Appeals noted in its opinion that it was grappling with the problem of "where the line should be drawn" as to the permissible extent of retroactivity. *Infra*, page 34. In analyzing a number of cases involving retroactive tax legislation, it duly noted that a tax is not necessarily invalid simply because it is retroactive. *Infra*, page 34. The court also took due note of the fact that this Court, as above set forth, has definitely declared that a two year retroactive effect does not exceed the limit of permissible retroactivity. *Infra*, page 39. The lower court discussed at length the case of *Wilgard Realty Co. v. Comm'r. of Internal Revenue*, 127 Fed. 2d 514 (2d Cir., 1942) cert. den. 317 U.S. 655, 87 L. Ed. 527, where a 1939 federal tax statute was allowed a retroactive effect on a 1932 transaction, i.e., a seven year retroactive effect. *Infra*,

page 43. Summarizing the cases, the Court of Appeals of Maryland concluded, as follows:

> "The instant case does not, in our estimation, fall within any of the usual types of cases in which retroactive taxing statutes have been upheld. It is not within the *'ratification'* cases, for there is no ratification; it is not within the group of cases which have upheld the correction of technical defects; and it is not within the 'recent transactions' cases, because the reach of the statute is too great in point of time — three to six years on the facts of this case. *The statute seeks to tax transactions completed long before the tax was in existence.* On the facts of this case and on the contentions submitted to us, we are of the opinion that the retroactive application of Chapter 3 of the Acts of 1957 would be in conflict with Article 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." (Emphasis supplied.) *Infra*, pages 45, 46.

Although Petitioner, in the lower court had, both in the briefs and on oral argument, pointed out that taxes had been imposed upon Martin's purchases for nearly seven years, pursuant to the opinion of Judge Hammond when Attorney General, the Court of Appeals of Maryland for some reason took no note of this fact and nowhere in its opinion even mentioned that ruling which the Petitioner had duly followed. The Court of Appeals of Maryland stated that Chapter 3 of the Acts of 1957 sought to "place a tax where *none was imposed before*, and to reach transactions completed long before its enactment", *infra*, page 45. It is respectfully urged that this statement simply does not conform with the facts and that the lower court was in error. Actually, taxes were imposed on Martin beginning in 1951, and continuing at least until 1956, the year of the *Aerial Products* decision, 210 Md. 627, 124 A. 2d 805. These taxes were imposed in accordance with an official

opinion of the Attorney General of Maryland who is now a member of the Court of Appeals of Maryland. In addition, until the Court of Appeals of Maryland held that the *Aerial Products* decision, supra, governed the Martin purchases, the *Aerial Products* case actually did not forbid the imposition of such taxes upon Martin. Therefore, the State of Maryland validly collected such taxes from Martin and all other taxpayers similarly situated until March 31, 1958, the date of the decision of the Court of Appeals of Maryland in this case.

5. *It is vital that this case should be decided by this Court and by no other, since this decision, if allowed to stand, is a blow not only to other States but also to the declared policy of the Federal Government itself which, for a number of years, has been encouraging the States to re-assume a greater share of responsibility for local government.*

The recent decisions of this Court show that local governments are constantly being allowed greater freedom of taxation in order that the economic burden of government can be more equally shared. There is a long line of cases in this Court showing the development of the theory of the permissible reach of local taxation from *McCullough v. Maryland*, 4 Wheat. 316, 4 L. Ed. 379 through *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. Ed. 155, 58 S.C. 208; *Alabama v. King & Boozer*, 314 U.S. 1, 86 L. Ed. 3, 62 S.C. 43; and *Curry v. United States*, 314 U.S. 14, 86 L. Ed. 9, 62 S.C. 48, to *United States v. City of Detroit*, .U.S. , 2 L. Ed. 2d 424, 78 S.C. ; *United States v. Township of Muskegon*, U.S. , 2 L. Ed. 2d 436, 78 S.C. ; and *City of Detroit v. Murray Corp.*, U.S. , 2 L. Ed. 2d 441, 78 S.C. .

As stated in the *Detroit* and *Muskegon* cases, supra, this Court should go "beyond the bare face of the taxing statute to consider all relevant circumstances." *United States v. Detroit, supra,* 2 L. Ed. 2d 424 at 427. It should consider the "practical operation" of the tax statute and "not its definition or precise form of descriptive words". It should look through form and behind labels to substances since "empty formalisms are too shadowy a basis for invalidating State tax laws." *Detroit v. Murray Corp., supra,* 2 L. Ed. 2d 441 at 445-446. It is respectfully urged that it is vital that this Court, in deciding this case, look through the form and labels of Chapter 3 to the substance of the Act and determine its exact operative effect. It should not be invalidated simply because of empty formalisms.

In this case the Maryland Legislature obviously intended to impose a tax on purchases such as Martin's when it enacted the Sales and Use Tax Act in 1947. It was so advised that it had done so by the Attorney General of Maryland in 1950. It thereupon collected such taxes from Martin from 1951 through 1956. When the Court of Appeals of Maryland handed down a decision which cast doubt on this policy of taxation, the Legislature immediately, at its next session, re-affirmed its purpose and enacted Chapter 3, thus subsequently providing the legislative foundation which may possibly have been lacking after the *Aerial Products* decision. Such action in no way constituted a reversal of the Court of Appeals of Maryland, so as to constitute a breach of Article 8 of the Maryland Declaration of Rights, providing for separation of powers. *Sanitary Comm'n. v. Noel,* 155 Md. 427, 433, 142 A. 634, 636, cert. den. 278 U.S. 573, 73 L. Ed. 513. On the contrary, the Legislature was simply performing its proper "function of closing loopholes." *Comptroller v. American Can Co.,* 208 Md. 203 at 209, 117 A. 2d 559 at 561. It called this enactment a new tax and re-imposed it retroactively.

The Maryland Legislature has thus done everything possible to impose sales and use taxes upon Martin's purchases which, under the recent decisions of this Court in the *Detroit* and *Muskegon* cases cited hereinabove, it was clearly entitled to do. The Court of Appeals of Maryland, in handing down its decision, did not reach this aspect since it declared Chapter 3 constitutionally invalid because of its excessive retroactive reach. It is, however, vital that this Court consider this aspect of the case because of the important effect on other States seeking to impose taxation of this type, and further, because the decision, if allowed to stand, will thwart the declared policy of the Federal Government in urging the States to assume a greater share of the burden of government.

6. *It is vital that this Court consider that part of the holding dealing with the pre-1957 law since that part appears to be in conflict with recent decisions of this Court.*

Although the second question presented may not appear on its face to raise a federal question since it involves the interpretation by a State court of its own State law, nevertheless Petitioner respectfully urges that the Court carefully examine the holding of the lower court on the question of taxation of Martin's transactions under the Maryland Sales and Use Tax Acts prior to the 1957 Amendments since that part of the holding appears to be contrary to the holdings of this Court in *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. Ed. 155, 58 S.C. 208; *Alabama v. King & Boozer*, 314 U.S. 1, 86 L. Ed. 3, 62 S.C. 43; and *Curry v. United States*, 314 U.S. 14, 86 L .Ed. 9, 62 S.C. 48. In all of these cases, as well as in the cases recently decided by this Court, *United States v. City of Detroit*, ... U.S. ....., 21 L. Ed. 2d 424, 78 S. Ct.; *United*

States v. Township of Muskegon, ... U.S. ....., 2 L. Ed. 2d 436, 78 S. Ct. ..... ; and *City of Detroit v. Murray Corp.*, ... U.S. ....., 2 L. Ed. 2d 441, 78 S.C. ....., transactions similar to Martin's were subjected to local taxation.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Involved

Chapter 3 of the 1957 Acts of the General Assembly of Maryland and related sections of the Maryland Sales and Use Tax Acts.

Retail Sales Tax Act

(Chapter 281, Acts of 1947, Article 81, Sec. 324, *et seq.*)

Sec. 324. (Definitions.) As used in this sub-title, the following terms shall mean or include:

* * * * * *

(d) "Sale" and "Selling" mean any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration including rental, lease or license to use, or royalty, by a vendor to a purchaser, or any transaction whereby services subject to tax under Section 325 of this sub-title are rendered for consideration to any purchaser by any vendor. Such consideration may be either in the form of a price in money, rights or property or by exchange or barter, and may be payable immediately, in the future, or by installments. Nothing in this sub-section shall apply to the renting of textiles, the essential part of which includes the recurring service of laundering or cleaning thereof, nor the rental of machines and equipment used exclusively for agricultural purposes.

* * * * * * *

(f) "Retail sale" and "sale at retail" shall mean the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this sub-title. Said term shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to

resell the property so transferred in the form in which the same is, or is to be received by him, or to use or incorporate the property so transferred, as a material or part, or other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining. For the purpose of the tax imposed by this sub-title, the term "sale at retail" shall include but shall not be limited to the following:

* * * * * *

Sec. 326. (Exemptions.) The tax hereby levied shall not apply to the following sales:

* * * * * *

(e) Casual and isolated sales by a vendor who is not regularly engaged in the business of selling tangible personal property.

(f) Sales which are not within the taxing power of this State under the Constitution of the United States.

* * * * * *

(k) Sales by manufacturers or producers of their own manufactured products when sold to other manufacturers, producers, wholesale or retail merchants for the purpose of resale. The exemption in this subsection shall not extend to or include sales by manufacturers or producers of their own manufactured products when sold to purchasers and not for the purpose of resale.

MARYLAND USE TAX

Sec. 372. (Definitions.) As used in this sub-title, the following terms shall mean or include:

* * * * * *

(d) "Use" means the exercise by any person within this State of any right or power over tangible personal property purchased either within or without this State by a purchaser from a vendor and includes but is not

limited to the receipt, storage, keeping or retention for any length of time of any building materials by any contractor, builder, or property owner. The term shall not include the following:

(1) The sale of tangib ersonal property by any vendor in the regular course of business,

(2) The incorporation of tangible personal property as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining.

* * * * * *

(h) "Retail sale" and "Sale at retail" means all sales in any quantity or quantities of tangible personal property whether within or without this State to any person for the purpose of use, storage or consumption within this State. For the purpose of the tax imposed by this sub-title, the term "sale at retail" shall not be limited to the following:

* * * * * *

Sec. 375. (Exemptions.) The use, storage or consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this sub-title:

(a) Tangible personal property upon which a retail sales tax has been paid to this State under the terms and provisions of Section 325 of this Article.

(b) Tangible personal property expressly exempted from the retail sales imposed by this State under the terms and provisions of Section 326 of this Article.

(c) Tangible personal property sold by any non-resident vendor to a purchaser, a resident of this State, if the sale thereof would have been exempt from the retail sales tax imposed by this State under Section 326 of this Article had said sale been made in this State.

CHAPTER 3 OF THE ACTS OF 1957
(Senate Bill 32)

AN ACT to add, effective July 1, 1947, a new Section 320(f) (6) to Article 81 of the Annotated Code of Maryland (1951 Edition and 1956 Supplement), title "Revenue and Taxes", sub-title "Retail Sales Tax Act", to follow immediately after 320(f) (5) thereof, more clearly to define "retail sale" and "sale at retail" as used in the Retail Sales Tax Act; and to repeal and re-enact, with amendments, effective July 1, 1947, Section 368(d) of Article 81 of the Annotated Code of Maryland (1951 Edition), title "Revenue and Taxes", sub-title "Maryland Use Tax", more clearly to define the word "Use" as used in the Marlyland Use Tax Act; and to provide that no person shall be subject to criminal prosecution as a result of the retroactive nature of this Act.*

WHEREAS, it is and has always been the intent of the General Assembly of Maryland that the definition of "Retail Sale" and "Sale at Retail" should include all sales, except sales in which the sole purpose of the purchaser is to resell the tangible personal property or services which he purchases either in the form in which the same is received by him; or to use or incorporate the property as a material or part of other tangible personal property, to be produced for sale, by manufacturing, assembling, processing or refining; and

WHEREAS, it is and always has been the intent of the General Assembly of Maryland that the definition of "Use" in the Maryland Use Tax should exclude only such property or service which is held solely for resale in the regular course of business or which is to be incorporated as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining; and

WHEREAS, the uniform administrative interpretation and enforcement by the Comptroller of the Treasury since the inception of the Retail Sales Tax Act and the

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*Note: Sec. 320(f)(6) now codified as Sec. 324(f)(6). Sec. 368(d) now codified as Sec. 372(d).

Maryland Use Tax has been in conformity with the provisions of this Act, therefore:

SECTION 1. *Be is enacted by the General Assembly of Maryland,* That effective as of July 1, 1947, Section 320(f) (6) be and is hereby added to Article 81 of the Annotated Code of Maryland (1951 Edition and 1956 Supplement) title "Revenue and Taxes" sub-title "Retail Sales Tax Act" to follow immediately after Section 320(f) (5) and to read as follows:

320(f) (6) Sales of tangible personal property and/or services to any person who will use the same as facilities, tools, tooling, machinery or equipment (including, but not limited to dies, molds and patterns) even though such person intends to transfer and/or does transfer title to such property or service either before or after such person uses facilities, tools, tooling, machinery or equipment.

If the user of facilities, tools, tooling, machinery or equipment (including, but not limiting to, dies, molds and patterns) is under obligation, by the terms of a written contract, at the time he purchases the facilities, tools, tooling, machinery or equipment (including, but not limited to, dies, molds and patterns) to transfer title to the same, at a price equal to or greater than his purchase price, to the person for whom he manufactures goods or performs work, such transfer shall not give rise to a second tax.

SEC. 2. *And be it further enacted*, that effective July 1, 1947, Section 368(d) of Article 81 of the Annotated Code of Maryland (1951 Edition), title "Revenue and Taxes" sub-title "Maryland Use Tax" be and the same is hereby repealed and reenacted with amendments to read as follows:

368(d) "Use" means the exercise by any person within this State of any right or power over tangible personal property purchased either within or without this State and includes but is not limited to the re-

ceipt, storage, keeping or retention for any length of time of any building materials by any contractor, builder, or property owner. This term shall also include but not be limited to use of facilities, tools, tooling, machinery or equipment (including, but not limited to dies, molds and patterns) by a purchaser thereof even though he transfers title to another either before or after use by him and without regard to whether title is transferred to the other within or without this State. This term shall not include the following:

(1) The sale of tangible personal property by any vendor in the regular course of business.

(2) The incorporation of tangible personal property as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining.

Sec. 3. And be it further enacted, That no person shall be subject to criminal prosecution or criminal penalties because of any violation of the provisions of these sections which occurred prior to the passage of this Act. Nothing contained in this act shall render taxable any sale or use of tangible personal property that is or was exempt from taxation under any exemption set forth by the expressed terms of sections 322 or 370 of Article 81 of the Annotated Code of Maryland (1951 edition and 1956 supplement).

Sec. 4. And be it further enacted, That if any one or more sections, clauses, sentences, words or parts of this Act shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions hereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid, and the inapplicability invalidity of any section, clause or provision of this Act in any one or more instances shall not be taken

to affect or prejudice in any way its applicability or validity in any other instance.

Sec. 5. And be it further enacted, That this Act is hereby declared to be an emergency measure and necessary for the immediate preservation of the public health and safety and having been passed by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly of Maryland, the same shall take effect from the date of its passage.

Approved January 28, 1957.

APPENDIX B

Opinion of Court of Appeals of Maryland

This case arises out of a claim by The Glenn L. Martin Company (now known as "The Martin Company" and referred to below simply as "Martin") for the refund of Maryland sales and use taxes paid by Martin to the Comptroller on purchases of tangible personal property made by Martin during the period from March 1, 1951, through April 30, 1954, pursuant to three so-called facilities contracts between Martin and departments of the United States Government. The Comptroller denied Martin's claim for refund, Martin appealed to the Circuit Court for Baltimore County and that Court, by its order, reversed the action of the Comptroller and entered judgment for Martin in the amount of $311,539.28. The Comptroller appeals from that order. The amount of the judgment was stipulated by both parties to be correct, if Martin should be held entitled to a refund under paragraph I of its claim, and the decision of the Circuit Court was based upon contentions made in that paragraph.

The essential facts of this case are very similar to those pertaining to the Army contract involved in *Comptroller v. Aerial Products, Inc.*, 210 Md. 627, 124 A. 2d 805. Martin is a manufacturer of airplanes and parts and of missiles or special weapons for military use. As a result of the Korean War the United States wanted such articles in greater quantity than Martin's existing facilities could produce, and Martin did not have the capital resources to expand its productive capacity to meet the Government's needs. Martin and the Government accordingly entered into three contracts, in two of which the Navy was the interested Department and in the other the Air Force, in order to supply Martin with the tools and equipment needed to produce the articles wanted by the Government. Under these contracts (referred to below as the "facilities contracts") the Government was to furnish to Martin such available tools and equipment as it had in reserve, Martin was not to procure facilities known to be so available, Martin was to pur-

chase other facilities that might be needed, title thereto was to pass to the Government upon delivery thereof to Martin, the Government was to reimburse Martin for the cost of facilities purchased pursuant to the contract and Martin was to be permitted to use the facilities free of charge or rent in order to manufacture munitions for the Government. All articles purchased by Martin were to be tagged so as to indicate Government ownership and they were so tagged. The Government had the right at any time to remove any property to which it acquired title pursuant to the contract and in one instance, involving a milling machine valued at $200,000, it exercised this power. The Navy contracts further provided that the Government should have the right to inspect and (at least under some circumstances) to reject property purchased by Martin before payment was completed, but generally all items that were within the scope of the contracts had to be accepted, subject to provisions relating to the correction of defects, if any should exist. Provisional payments were to be made by the Government to Martin, and the Government was to have a lien for advance payments on articles contracted for or acquired under any of the facilities contracts "except to the extent that the Government, by virtue of any other provisions of this contract shall have valid title to such articles, things, materials or other property as against other creditors of the contractor." The Navy facilities contracts also contained provisions under which the Government would reimburse Martin for any sales and use taxes imposed by any state or local taxing authorities if Martin paid the same under protest and took appropriate steps to preserve any claims for refund. The Air Force contract contained a somewhat similar provision for reimbursement of "all taxes * * * properly and legally taxed, assessed or imposed upon the Contractor's interest made or created pursuant to the provisions of this contract with respect to part or all of the facilities provided hereunder or the use thereof."

None of the facilities contracts used the words "for resale to the Government" which are found at two or more points in the Army contract involved in the *Aerial Products*

case where the facilities to be acquired or purchased thereunder are spoken of as being so acquired or purchased. None of them permits Martin to make a profit on the resale of any of the facilities to the Government.

The first of the two principal questions presented in this case is whether or not the purchases of facilities made by Martin between 1951 and 1954 under the facilities contracts were subject to sales or use taxes under the provisions of Article 81 of the Code relating to such taxes as they read at the times when the purchases in question were made.

The second, which arises only if the answer to the first question is "no", is whether or not such purchases may constitutionally be subjected to sales and use taxes by amendments to Article 81 of the Code effected by Chapter 3 of the Acts of 1957, which that Act undertook to make retroactive to July 1, 1947, which was the effective date of the Sales and Use Tax Acts adopted in that year.

Taxability Prior to January, 1957.

The Comptroller contends that the dominant purpose of Martin in making the purchases in question was to build up its own production facilities and that no purpose of the purchaser to resell the property was shown. This contention is rested heavily on the absence from the facilities contracts of the words "for resale to the Government," on the absence of any profit to Martin on sales of the facilities to the Government and on the claim that Martin could, for at least a "taxable moment," use the facilities before title passed to the Government.

The Sales Tax and Use Tax Acts are included as subtitles in Article 81 of the Code (1951), and references below to pertinent portions of those Acts as in force during the years 1951-1954, inclusive, will be made simply by section numbers.

Section 320 (d), a part of the Sales Tax Act, defines "sale" as including "any transaction whereby title or possession, or both, of tangible personal property is * * * transferred

* * * for a consideration by a vendor to a purchaser * * *." Section 320 (f) defines a "retail sale" or a "sale at retail" as including "the sale in any quantity or quantities of any tangible personal property" and states that "[S]aid term shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be received by him, * * *."

The Use Tax Act is complementary to the Sales Tax Act (*Comptroller v. Crofton Co.*, 198 Md. 398, 84 A. 2d 86, *Comptroller v. Thompson Trailer Co.*, 209 Md. 490, 121 A. 2d 850). Judge Raine, in his comprehensive opinion in the Circuit Court, said in part: "The language of the Use Tax sections differs from the Sales Tax provisions, but there is nothing in the record before this Court to indicate what, if any, portion of the taxes paid are 'Use' Taxes and not 'Sales' Taxes. * * * The Comptroller concedes, that it is well established by administrative interpretation that the taxes are complementary and that the Use Tax only applies to those transactions subject to a Sales Tax, but on which no tax has been paid. Consequently, if the transactions are not subject to the Sales Tax, they are not subject to the "Use Tax." To this we add the following passage from Judge Collins' opinion in the *Aerial Products* case (210 Md. 631-632): "At the argument in this Court the appellant [Comptroller] admitted that there was no evidence under which the Maryland Use Tax could be collected. The question here, therefore, involves only the Maryland Retail Sales Act."

In the present case both sales taxes and use taxes are involved, but they have been dealt with throughout the proceedings on the basis that the exclusion stated in Section 320 (f) was as applicable to use taxes as to sales taxes. This is shown by the absence of any breakdown between the two types of taxes, by the stipulation above mentioned as to the amount, if any, which Martin would be entitled to recover, by the Opinion of the Comptroller (signed by the Hearing Officer), in which it is said that "[e]xactly this same test [whether Martin purchased the property for re-

sale or for manufacturing its own products] should be used in determining whether or not the facilities purchased outside the State of Maryland were subject to the use tax", by the concession in the trial court above referred to, and by the absence of any argument for separate treatment in the appellant's brief.[1] On this state of the record we think that no question as to possibly different treatment for the two taxes is before us for decision. Rules 831 c. 2 and 4 (relating to Contents of Briefs) and Rule 885 (relating to Scope of Review) of the Maryland Rules; *Comptroller v. Aerial Products, Inc., supra,* and cases therein cited at 210 Md. 645.

We think that the *Aerial Products* case, *supra,* and *Baltimore Foundry & Machinery Corp. v. Comptroller,* 211 Md. 316, 127 A. 2d 368, are conclusive in establishing the sufficiency of Martin's purpose to resell the facilities purchased by it to the Government to obtain the benefit of the exclusion under Section 320 (f), as in force in 1951-1954, since these cases establish the rule that under that Section the purpose of the purchaser to resell the property need not be his sole purpose in making the purchase in order to make the exclusion operative.

The absence from the facilities contracts here involved of the words "for resale to the Government" is not controlling. The contracts made it perfectly clear that title to facilities purchased by Martin was to be transferred to the Government immediately upon delivery of the equipment to Martin, and the Government became obligated to reimburse Martin for the cost thereof. The right of rejection reserved under the Navy contracts, the precise scope of which is somewhat obscure, still would not detract from

[1] Counsel for the appellant did point out in rebuttal argument that the Use Tax Act definition of "use" in Sec. 368 (i) (1) excludes sales by vendors "in the regular course of business." It does not employ the phrase found in Sec. 320 (f) of the Sales Tax Act dealing with sales "in which it is the purpose of the purchaser to resell * * *. Cf. *Comptroller v. Crofton Co., supra.* Sec. 370 (c) of the Use Tax Act carries over exemptions under Sec. 322 of the Sales Tax Act.

Martin's purpose to resell to the Government, nor would it prevent the passage of title to the Government when the equipment was delivered to Martin.

Likewise, in view of this provision for the immediate passage of title to the Government upon delivery of the equipment to Martin, there was no moment at which Martin could use the equipment prior to the passage of title. Even if there had been such an interval of time, the result would not have been altered. See *Baltimore Foundry & Machinery Corp. v. Comptroller, supra*, where the fact that some time might elapse between the purchase of a pattern by the foundry and its resale to the customer did not change the result.

The appellant urges that the absence of any profit to Martin on the resale of equipment to the Government manifests a lack of genuine purpose to resell. We think that this does not follow. In the *Baltimore Foundry* case, the expectation or realization of a profit on resale was regarded as a factor indicating that a genuine resale was intended, but there was no possibility of a profit to the contractor on resale under the Army contract in the *Aerial Products case*. In the latter case, as in this, the contract provided for resale to the Government at cost.

The Retroactive Amendments.

The opinions in the *Aerial Products* and *Baltimore Foundry* cases were filed, respectively, on July 30, and December 6, 1956. The next session of the General Assembly held thereafter opened in January, 1957, and one of the first bills enacted became Chapter 3 of the Acts of 1957, approved on January 28th of that year. This Act was declared (by Section 5 thereof) to be an emergency measure and it was therefore stated to take effect from the date of its passage. In one sense this declaration as to the effective date was an understatement, since the Act undertook to amend certain provisions of the Sales and Use Tax Acts as of July 1, 1947. There is no question that this enactment was a direct consequence of the *Aerial Products* and *Baltimore*

Foundry decisions and was intended to bring about an opposite result in similar cases, past as well as future.

The Act contains three recital clauses. These, so far as here relevant, say that "it is and has always been the intent of the General Assembly" * * * "that the definition of 'Retail Sale' and 'Sale at Retail' should include all sales, except sales in which the *sole purpose* of the purchaser *is to resell* the tangible personal property * * *"; that "the definition of 'Use' in the Maryland Use Tax should exclude only such property * * * which is held *solely for resale in the regular course of business* * * *"; and that "the uniform administrative interpretation and enforcement by the Comptroller * * * since the inception of the Retail Sales Tax Act and the Maryland Use Tax has been in conformity with the provisions of this ACT * * *." (Italics supplied.) The word "ACT" was substituted for the word "amendment" as the last word in the above quotation by an amendment made while the bill was under consideration by the Legislature. These recitals do not constitute a part of the actual enactments made by the statute. *Hammond v. Frankfeld*, 194 Md. 487, 71 A. 2d 482; *Gibson v. State*, 204 Md. 423, 104 A. 2d 800. They do not in terms state the law to have been otherwise than as this Court determined it to be in the *Aerial Products* and *Baltimore Foundry* cases; and if they had undertaken to do so, they would, to that extent, have encountered an insurmountable constitutional obstacle to their validity. Md. Declaration of Rights Art. 8; *Crane v. Meginnis*, 1 G. & J. 463, 476; *Baltimore v. Horn*, 26 Md. 194; *Marburg v. Mercantile Bldg. Co.*, 154 Md. 138, 140 A. 836; *Montgomery County v. Bigelow*, 196 Md. 413, 77 A. 2d 164.

We turn then to the operative provisions of Chapter 3 of the Acts of 1957. The first section added to the Sales Tax Act a new paragraph of sub-section (f) of Section 320, designated as (6). The second section of the Act amended the definition "use" in Section 368 (d), which is a part of the Use Tax Act. Each of these sections was enacted as effective July 1, 1947." The third section of the Act exempted any person from criminal prosecution or penalties

"because of any violation of the provisions of these sections which occurred prior to the passage of this Act." ("These sections" are not identified, but presumably mean Section 320 (f) (6) and 368 (d) as added or amended by Chapter 3, Acts of 1957.) Section 3 was evidently intended in part to avoid making the Act an *ex post facto* statute. It also states that the Act shall not render taxable any sale or use which was exempt from taxation under the expressed terms of Section 322 or Section 370. (In the *Baltimore Foundry* case, the sales of patterns to the Foundry Corporation were held to be excluded from taxability under Section 321 by the definition of "retail sale" or "sale at retail" contained in Section 320 (f) and not by reason of an exemption under Section 322. See 211 Md. at 319.) The fourth section of Chapter 3 of the Acts of 1957 is a separability clause, and the fifth section (as already noted) is the emergency measure clause.

Section 320 (f), as amended by Chapter 3 of the Acts of 1957, so far as here material, reads as follows: "For the purposes of the tax imposed by this sub-title, the term 'sale at retail' shall include but shall not be limited to the following * * * (6) Sales of tangible personal property * * * to any person who will use the same as facilities, tools, tooling, machinery or equipment (including, but not limited to dies, molds and patterns) even though such person intends to transfer and/or does transfer title to such property or service either before or after such person uses the facilities, tools, tooling, machinery or equipment." Then follows a provision exempting from taxation a resale, pursuant to a contract, made at a price not less than the cost to the purchaser-reseller of the property acquired in a transaction declared taxable by the quoted portion of paragraph (6).

The principal amendment to Section 368 (d) was the addition of this sentence to the definition of the term "use": "This term shall also include but not be limited to use of facilities, tools, tooling, machinery or equipment (including, but not limited to dies, molds and patterns) by a purchaser thereof even though he transfers title to another

either before or after use by him and without regard to whether title is transferred to the other within or without this State."

Obviously these provisions are intended to cover just the kinds of transactions here involved, and equally obviously they are retroactive. The question is: are they valid?

Both Article 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States are invoked by the appellee against the validity of Chapter 3 of the Acts of 1957. Since that Act was passed after this case had been submitted to the Circuit Court on appeal from the Comptroller's action, the question as to the validity of the Act was raised by amendment of the appellee's original petition with regard to the questions of law presented.

It is well established that a tax is not necessarily invalid simply because it is retroactive. See *Diamond Match Co. v. State Tax Comm.*, 175 Md. 234, 200 A. 365, and the exhaustive review of authorities therein contained; *Leser v. Wagner*, 120 Md. 671, 87 A. 1040, affd. *sub nom.; Wagner v. Baltimore*, 239 U.S. 207; *Welch v. Henry*, 305 U.S. 134; to cite only a few of many cases. There are, however, a number of cases in which retroactive taxes have been held invalid as violative of due process, to some of which we shall refer below. The problem is the familiar one in due process cases as to where the line should be drawn. It is not easy of solution, and it is difficult, if not impossible, to deduce a clear line of demarcation applicable to all cases.

The question of the validity of retroactive tax laws has arisen in a variety of circumstances and has been met in several different ways.

We may first note the so called ratification cases, among which *U.S. v. Heinszen & Co.*, 206 U.S. 370, is probably the leading case. It upheld an Act of Congress which validated customs duties previously imposed under Presidential, rather than Congressional authority. Other Supreme Court decisions had established the lack of power to impose

such duties without the authorization of Congress. The case was rested squarely upon ratification of the acts of an agent done without prior authority from the principal. The *Heinszen* case was followed in *Tiaco v. Forbes*, 228 U.S. 549, and in *Rafferty v. Smith, Bell & Co.*, 257 U.S. 226. In *Tiaco v. Forbes*, 228 U.S. at 556, Mr. Justice Holmes thus stated the ratification doctrine: "[I]t generally is recognized that * * * where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by the subsequent adoption of the act. The person who has assumed to represent the will and person of the superior power is given the benefit of the representation if it turns out that his assumption was correct. [Cases cited.]"

But the doctrine is not without limitations, as was held in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338. There the plaintiff boat line sued to recover tolls charged by the defendant board for the use of a canal lock made in or prior to 1917. At that time the Board had no power to impose such charges. As the report of the original case below, (77 Fla. 742) shows, the canal and lock were parts of a drainage system which the Board was authorized to construct and maintain, and the statute imposed taxes on lands within the drainage district to cover the expenses of the Board in the construction and maintenance of the system, but it said nothing whatever about tolls for use of the canal or locks. In 1919 the Florida Supreme Court upheld the plaintiff's declaration, and on the very day that it did so, the Florida Legislature passed an act to validate the collection of tolls. The Florida Supreme Court later upheld this act, basing its decision on the *Heinszen* case. The Supreme Court of the United States reversed the judgment. The opinion, also written by Mr. Justice Holmes, said in part: "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of *United States v. Heinszen & Co.*, 206 U.S. 370, (*Rafferty v. Smith, Bell & Co.*, 257 U.S. 226), which held that Congress could ratify the collection of a

tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. *Wagner v. Baltimore*, 239 U.S. 207, 216, 217. *Stockdale v. Atlantic Insurance Co.*, 20 Wall 323. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act * * *. If we apply that principle this statute is invalid. For if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratutious deposit of rolls." (258 U.S. at 339.)

We think that under the *Forbes Pioneer Boat Line* case the application of the doctrine of ratification would not be supportable, even if there were a clear legislative ratification; but we also think that any actual ratification is lacking. The nearest approach to it that we have in the instant case is contained in the preamble to Chapter 3 of the Acts of 1957, and, as we have noted, the preambles are not operative parts of the statute. On the contrary, the pertinent operative parts of that Act undertake retroactively to add a clause to the Retail Sales Tax Act and to amend a provision of the Use Tax Act. These changes, we think, constitute new enactments rather than ratifications.

Taxes for past benefits have been upheld by the Supreme Court and by this Court. *Seattle v. Kelleher*, 195 U.S. 351; *Baltimore v. Ulman*, 79 Md. 469, 30 A. 43; *Leser v. Wagner* and *Wagner v. Baltimore*, *supra*; *Washington Suburban Sanitary Comm. v. Noel*, 155 Md. 427, 142 A. 634. See also *Leonardo v. County Commrs.*, 214 Md. 287, 134 A. 2d 284. A retroactive tax on property omitted from the tax rolls was upheld in *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526. Such cases do not seem to be in point in the present controversy.

There have been a number of estate, inheritance and gift tax cases in which the question of retroactivity has been involved.

Nichols v. Coolidge, 274 U.S. 531, held unconstitutional the imposition of the Federal estate tax under the Revenue Act of 1919, Sec. 402 (c), upon the estate of a decedent who died in 1921 in respect of property transferred under an irrevocable trust made in 1907, under which the decedent, Mrs. Coolidge, and her husband, the settlors, retained a life interest which they assigned to other beneficiaries under the trust in 1917.[2] (The Federal Estate Tax Act of September 8, 1916, had been held in *Schwab v. Doyle*, 258 U.S. 529, to apply only to transfers subsequently made.) The Act of 1919 was clearly intended to include prior as well as subsequent transfers made in contemplation of death or intended to take effect at or after death in calculating the gross estate for tax purposes. The opinion held that "the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation." 274 U.S. at 543. Justices Holmes, Brandeis, Sanford and Stone concurred in the result. They filed no separate opinion.

In *Coolidge v. Long*, 282 U.S. 582, which was more or less a companion case to *Nichols v. Coolidge*, *supra*, Massachusetts sought to impose a tax under a 1921 statute upon the same trust property involved in the *Nichols* case on the death of Mr. Coolidge, which occurred in 1925. The Supreme Judicial Court of Massachusetts upheld the tax (268 Mass. 443, 167 N.E. 757), but the Supreme Court of the United States held it invalid. The latter Court noted that the 1907 transfer antedated any statute imposing a tax upon succession to the property, and the majority opinion held that the rights of beneficiaries under the trust had so far vested prior to the taking effect of the tax statute that

[2] Other transfers which were held to be absolute gifts are not material here.

there was hereafter no occasion in respect of which the excise might constitutionally be imposed.[3]

In *Milliken v. U.S.*, 283 U.S. 15, the Supreme Court upheld the applicability of the rates of the Federal estate tax prescribed by the Revenue Act of 1918 to a gift made in contemplation of death in December, 1916, by a donor who died in 1920. The Revenue Act of 1916, which was in force when the gift was made, made such a gift includible in the gross estate of a decedent, but the rate of taxation was lower. In upholding the application of the tax at the rates fixed by the 1918 Act, the Court emphasized the policy, already manifested by the 1916 Act, of taxing at the same rate property transferred by testamentary disposition and property transferred by a substitute for such disposition. An increase in rates in accordance with such a policy adopted between the date of a gift and the date of the donor's death, is, of course, quite different upon the imposition of a tax upon a transaction which was not subject to any tax when consummated.

Blodgett v. Holden, 275 U.S. 142, 147 (1927) and *Untermyer v. Anderson*, 276 U.S. 440, 445 (1928) involved the newly enacted gift tax, embodied in the Revenue Act of 1924, which was approved June 2, 1924. The Act purported to tax all transfers of property by gift made in the calendar year 1924. The two cases held respectively that the retroactive effect of the act constituted a denial of due process and was therefore invalid (1) in the case of the first taxpayer who in January of 1924 had made his gift even before the Act had been submitted to Congress, and (2) in the case of the second taxpayer who had made a transfer by gift on May 23, 1924, some three months after the provisions of the Act had been first presented to Congress and while the conference report upon the bill was pending.

Questions of retroactivity have also arisen in income tax cases.

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[3] See also *Helvering v. Helmholz*, 296 U.S. 93, and *White v. Poor*, 296 U.S. 98.

In *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, the Federal income tax imposed by the Act of October 3, 1913, was held valid as to income arising on and after March 1, 1913, that date being subsequent to the effective date of the Sixteenth (Income Tax) Amendment. In *Lynch v. Hornby*, 247 U.S. 339, the Income Tax of 1913 was held valid as to dividends paid by a corporation to its stockholders after March 1, 1913, whether paid out of current earnings or from surplus accumulated before that date.

Welch v. Henry, 305 U.S. 134, referred to above, involved a retroactive income tax imposed by a Wisconsin statute enacted on March 27, 1935, applicable to dividends received in the year 1933, which, at the time of receipt, were deductible from gross income. The statute was upheld over an objection based upon the Due Process Clause of the Fourteenth Amendment. Like the Maryland franchise tax which this Court upheld in the *Diamond Match Co.* case, *supra*, this Wisconsin tax was designed to meet the emergency created by the post-1929 depression. It is clear from the majority opinion (written by Mr. Justice Stone) that the Court recognized that there was some limit in time beyond which a statute could not operate retroactively consistently with due process. The Court stated (p. 149): "We cannot say * * * that in view of well established legislative practice, both state and national, taxpayers can justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income *at the first opportunity after knowledge of the nature and amount of the income is available*. And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied. *Cooper v. United States*, 280 U.S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment." (Emphasis supplied.) The last sentence of the opinion (p. 151) also significantly states: "While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity', we cannot say that it exceeds it."

The principle that there may exist a time period beyond which a statute may not constitutionally be given retroactive effect is implicit also in *Cooper v. United States*, 280 U.S. 409, cited in *Welch v. Henry*. There, in upholding a statute retroactively changing the basis of property acquired by gift after a certain date, the Court said (at p. 411): "That the questioned provision can not be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income has not been open to serious doubt since *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, and *Lynch v. Hornby*, 247 U.S. 339."

The limited period of retroactive taxation imposed by the Silver Purchase Act of 1934 was emphasized in *United States v. Hudson*, 299 U.S. 498, and appeared to be persuasive to the Supreme Court, which affirmed the validity of the tax against due process objections.

There are numerous cases cited in *Welch v. Henry, supra*, which rejects the contention that the particular retroactive application of a revenue act constituted a denial of due process. It is significant, however, that all these cases deal with tax laws which were retroactive for very limited periods of time, and nowhere in any of them do we find advanced the theory that the legislative power to tax retroactively is unlimited in the sense that any period in the past may be reached. *Welch v. Henry* holds essentially that the period of retroactivity in that case did not exceed the permissible time limit. How far this limit extends was not defined by the Supreme Court in that case, or in any subsequent case to date. However, several state courts have considered the problem and have refused to extend the permissible time period of retroactivity beyond that sanctioned in *Welch v. Henry*.

People v. Graves, 280 N.Y. 405, 21 N.E. 2d 371 (1939), by a 4-3 decision struck down a 1935 amendment of a state income tax statute authorizing the retroactive taxation of income from foreign realty for a period of sixteen years in the past. In citing *Welch v. Henry, supra*, the court noted that the Wisconsin court in the state appeal of that case

had observed that while the tax there involved might "approach or reach the limit of permissible retroactivity," it did not exceed it. A majority of the New York court showed no inclination to increase the scope of "permissible retroactivity."

In *Lacidem Realty Corp. v. Graves*, 288 N.Y. 354, 43 N.E. 2d 440 (1942), as in this case, an amendment of a tax law was enacted as effective as of the original effective date of the tax. That date was about four years earlier. The amendment sought to subject a new and different class of persons to a tax on sales of electricity. All of the judges held this retroactive amendment invalid. By a 4-3 division an alternative tax retroactive for less than seventeen months (to take effect if the four-year period were held invalid) was upheld under the "prior but recent transactions" cases.

In *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A. 2d 563, it was held that the 1947 state corporate net income tax act which prohibited the deduction from 1944 net income of carry-back losses sustained in 1946 (allowed under the prior law) was violative of due process and therefore invalid. The Court stated (p. 568): "It is obvious, however, that there must be some limitation on the right of a legislative body to pass laws imposing taxes retroactively, for otherwise a legislature could constitutionally impose new or increased taxes retroactively for a period of 25 or 50 years, which might be so onerous or confiscatory and unjust as to bankrupt the individuals or corporations thus taxed. This was recognized in *Welch v. Henry* * * *. Following *Welch v. Henry*, we decide that a tax may not be retroactively applied beyond the year of the general legislative session *immediately preceding that of its enactment;* to provide otherwise constitutes a denial of due process."

See also *Wheeler v. Commissioner of Internal Revenue*, 143 F. 2d 162 (9th Cir., 1944), where it was held that Section 501 (a) of the Second Revenue Act of 1940 relating to computation of earnings and profits of a corporation could not be retroactively applied in the case of a personal holding company's liquidation which had been completed in 1938

under the Revenue Act of 1938. *Welch v. Henry, supra,* was considered at length and the Court concluded (p. 168): "* * * the courts have held that there is a point of time when such retroactivity is beyond the legislative power. The rule that such amendment to legislation must come within the next session of the legislature or within a reasonable length of time as analyzed in the *Welch v. Henry* case * * * is the sounder view." The court held that the 1940 Act went beyond the scope of "permissible retroactivity" and accordingly held for the taxpayer. This decision was reversed by the Supreme Court in 324 U.S. 542, but is still persuasive, since the basis of reversal did not concern the question of retroactivity. The Supreme Court held that the method of determining "earnings and profits" proposed by the Commissioner was in fact required by the 1938 Act, and hence that no retroactive application of the 1940 Act was involved in the case.

The Comptroller relies upon *Wilgard Realty Co. v. Commr. of Internal Revenue,* 127 F. 2d 514 (2d Cir., 1942), cert. den. 317 U.S. 665. In that case the owner of certain real property conveyed it to a corporation (the taxpayer) in 1932 in exchange for all or substantially all of its stock and the assumption by the corporation of the transferor's indebtedness secured by mortgages on the real estate. The transferor gave to relatives 80% of the stock, nearly all of it immediately after the exchange. The real estate was sold in 1937 and the corporation was then liquidated. It appears that all parties treated the 1932 exchange as tax-free; but in 1938 the Supreme Court held in *U. S. v. Hendler,* 303 U.S. 564, that such an exchange was not tax-free because of the assumption of liability of the transferor by the transferee. This decision was followed by the Revenue Act of 1939, §213 (f) (1) of which was passed to do away with the effect of the Hendler decision and by its terms it was retroactive. The Commissioner contended that it should be given such effect and that the cost basis of the property to the Wilgard Realty Company should accordingly be that of its transferor at the time of the transfer and that such basis should be used in determining gain or loss on the

sale made in 1937. The court upheld his contention and held the 1939 statute effective retroactively to 1932. The court stated the determinative question in the *Wilgard* case in this way: "The decisive test in this instance is whether the taxpayer has had its expectations as to taxation unreasonably disappointed." The court adopted the view that in 1932 neither the taxpayer nor its controlling stockholder thought that the assumption of indebtedness gave rise to gain or loss or affected the corporation's tax basis and that the 1939 amendment of the law merely validated the method which both parties to the 1932 exchange used in reporting the effect of that transaction. The court then held that the taxpayer had done nothing which it would not have done if the law had been in 1932 just what the 1939 amendment had made it, and that it had, "therefore, not been the victim of any injustice and until it can show that it has been hurt it may not challenge the constitutionality of the statute."

Perhaps the *Wilgard* case actually holds no more than that if a taxpayer comes out taxwise exactly where he expected to as a result of a transaction which he entered into voluntarily, he has no constitutional ground for complaint if that result is achieved through retroactive legislation. Perhaps the case goes further and at some points it seems to us that it does. At one of these points (127 F. 2d 517) the court said that "retroactive taxation is not so arbitrary and oppressive as to be unconstitutional if it is no more burdensome than the taxpayer should have expected it to be when he did the thing which created the tax liability." This statement appears to presuppose a double gift of foresight on the part of the taxpayer: first, he must foresee that retroactive legislation may impose a tax upon a transaction which is not subjected to taxation when consummated; second, he must be able to estimate how much of a burden will be imposed. In cases such as *U. S. v. Hudson, supra,* 299 U.S. 498, involving a tax imposed by the Silver Purchase Act of June 19, 1934, and made retroactive to May 15, 1934, on profits derived from transfers of silver bullion, such prescience on the part of a taxpayer may reasonably be assumed. The facts that such a tax had been publicly advocated for some months, that the imposition of such a tax

was recommended by the President in a message to Congress on May 22nd and that the bill which became the Silver Purchase Act was introduced on May 23rd, 1934, were all taken into account by the Supreme Court in upholding the brief period of retroactivity provided for by that Act. There was adequate forewarning.

In different circumstances, and probably in most, however, a test based upon what the taxpayer should have anticipated, seems to us to involve so many uncertainties that we should not be willing to adopt or rely upon it as a general applicability.

If we approach the *Wilgard* case as standing for the rather narrow rule first suggested — that the taxpayer cannot complain of retroactive legislation which gives him exactly what he expected — we find substantial differences between the *Wilgard* case and the present case. Though Martin and the Government evidently contemplated the possibility that sales or use taxes might be claimed to be due, it is also clear that they inserted provisions in the facilities contracts designed to avoid incurring such taxes, that they contemplated contesting the validity of such taxes if claims therefor were asserted, and that from the outset they denied any liability therefor. We find nothing to indicate any anticipation of retroactive taxes. We may add that we find no real analogy between this case, where the Government and a prime contractor were working out arrangements for the production of munitions of war during actual hostilities, and a case such as *Milliken v. U. S.*, *supra*, 296 U.S. 15 (extensively relied on in the *Wilgard* case), in which a donor made a gift in contemplation of death, knowing at the time of the statutory policy to include such gifts in the gross estate of a decedent and to tax them at the same rates as testamentary dispositions.

Mr. Justice Holmes pointed out in the *Forbes Pioneer Boat Line case*, *supra*, that by varying circumlocutions the courts have tended to uphold retroactive tax statutes which cured more or less technical defects; but he concluded that same opinion (258 U.S. at 340) by saying: "It would seem from the first decision of the Court below that the trans-

action was not one for which payment naturally could have been expected. To say that the legislature was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot."

This reasoning, we think, is applicable in the instant case. The Sales tax Act as we have construed it in the *Aerial Products* and *Baltimore Foundry* cases did not tax a sale in which it was the purpose, even though not the sole purpose, of the purchaser to transfer title. Without "putting something of a gloss upon the facts" we could not say that the 1957 Act established "the situation as both parties knew from the beginning it ought to be."

On the case as presented, we think that Chapter 3 of the Acts of 1957 seeks to place a tax where none was imposed before and to reach transactions completed long before its enactment. In *Jones v. Gordy,* 169 Md. 173, 180 A. 272, this Court held the 1935 Emergency Gross Receipts Tax not to be applicable to receipts coming into the hands of the seller after the passage of the Act imposing the tax which were derived from sales consummated prior to its passage. The tax, by its terms, was a license tax on the privilege of engaging in business to be measured by the receipts from sales. Chief Judge Bond said (169 Md. at 182): "An intention to license business already engaged in previously might of itself be considered so illogical and unreasonable as to be doubtful." One of the bases for the construction of the Act adopted by the Court was to avoid such a constitutional doubt. The question of constitutionality was not decided, but it is evident that the Court considered the question a serious one.

The instant case does not, in our estimation, fall within any of the usual types of cases in which retroactive taxing statutes have been upheld. It is not within the "ratification" cases, for there is no ratification; it is not within the group of cases which have upheld the correction of technical de-

fects; and it is not within the "recent transactions" cases, because the reach of the statute is too great in point of time — three to six years on the facts of this case. The statute seeks to tax transactions completed long before the tax was in existence. On the facts of this case and on the contentions submitted to us, we are of the opinion that the retroactive application of Chapter 3 of the Acts of 1957 would be in conflict with Article 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

In view of this conclusion none of the other questions presented calls for determination, and we find no occasion at this time to consider the effect of the recent decisions of the Supreme Court in the cases of *Detroit v. The Murray Corporation*, 355 U.S. (two cases, Nos. 18 and 36, Oct. Term. 1957), *U. S. Muskegon*, 355 U.S. (two cases Nos. 37 and 38, same Term) and *U. S. and Borg-Warner Corp. v. Detroit*, 355 U.S. (No. 26, some Term), all decided March 3, 1958, with regard to various claims advanced by or on behalf of Martin or the United States.

ORDER AFFIRMED, WITH COSTS

APPENDIX C

Opinion of Attorney General of Maryland
Reported in Volume 35 at page 285

January 4, 1950

Edward F. Engelbert, Esq.
Retail Sales Tax Division
Office of State Comptroller
34 Hopkins Place
Baltimore 1, Maryland

Dear Mr. Engelbert:

This opinion deals with Sales and Use Taxes upon sales of personal property to contractors performing research and development work for the United States Navy. We have discussed the matter at length personally and by correspondence with Lt. Commander Albert L. O'Bannon, Chief Tax Officer under the Judge Advocate General, who has submitted to us a memorandum presenting the Navy's position.

It seems that the Kellex Corporation (admittedly an independent contractor as distinct from an agent) is under contract with the Navy to conduct research and development in connection with ordnance equipment. This work is done under Navy supervision in a plant at Silver Spring, Maryland, owned by the United States and leased to Kellex. Kellex buys all of the materials in its own name and is reimbursed for their cost by the Government. Most of the materials are consumed in the research and development process.

The contract provides:

"*Article 4. Title and Identification of Material.*

"(a). The title to all materials, parts, assemblies, sub-assemblies, supplies, equipment and other property for the cost of which the Contractor is entitled to be reimbursed hereunder shall automatically pass to and vest in the Government upon delivery to the

Contractor or upon the happening of any other event by which title passes from the vendor or supplier thereof, in the case of any such property which is purchased for the performance of this contract, or, in the case of property not so purchased, upon the allocation thereof to the contract by the commencement of processing or use thereof or otherwise. Such passage and vesting of title shall not impair any right which the Government might otherwise have under the contract, and shall not relieve the Contractor of any of its obligations under this contract."

Under *Alabama v. King & Boozer*, 314 U.S. 1 (1941), there is no question of the State's power to impose the tax on the sales in question. The Federal Government's real contention is based upon construction of the Maryland Sales and Use Tax Acts.

It argues that as title to the goods passes to the Government immediately upon its passage to Kellex, the sales involved are sales "in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be received by him" within the meaning of Section 259 (f) of Article 81 of the Code of Public General Laws. He points out that Section 259 (d) defines "sale" and "selling" to mean "any transaction whereby title or possession, or both, * * * is to be transferred by any means whatsoever for a consideration by a vendor to a purchaser."

Conceding for the sake of argument that the purchaser (Kellex) does "resell the property so transferred in the form in which the same is, or is to be received by him", is this "the purpose" of Kellex within the meaning of Section 259 (f)?

The dominant purpose of the contract is research and development, which imply the employment of special knowledge and skills, experimentation, trial and error. It is primarily a contract for services. In the process, materials are necessarily purchased, combined, reworked, con-

sumed and discarded. The passage of title to these materials to the Navy appears to be merely an incident to the main object of the contract. A purpose of the contract, such passage of title may be; but it is not *the main* purpose. And as applied to such a mixed transaction, if they have any meaning at all, the words: "the purpose of the purchaser" (as used in Section 259(f)) must mean "the dominant purpose". We think the exception is intended to apply to wholesalers, retailers and manufacturers in the ordinary sense — not to an ultimate consumer. Though the contract in question incidentally provides for immediate passage of title to the Government, Kellex is in reality (certainly as to most of the material purchased), and within the purpose of the contract, the ultimate consumer.

For these reasons, we think sales to Kellex for use under its contract with the Navy are not exempt from the Maryland Sales and Use Taxes.

Very truly yours,

(Signed) HALL HAMMOND,
Attorney General,

(Signed) WARD B. COE, JR.,
Assistant Attorney General.

HH:MH
WBC